



CITY OF LODI

COUNCIL COMMUNICATION

AGENDA TITLE: Set Public Hearing for May 6, 1992 to Consider
Proposed Amendment to Lodi Municipal Code Chapter 3.20
Establishing Criteria for Determination of "Lowest
Responsible Bidder".

MEETING DATE: April 1, 1992

PREPARED BY: City Attorney

RECOMMENDED ACTION: That the City Council set a public hearing for
May 6, 1992 to discuss an amendment to Lodi
Municipal Code Chapter 3.20 as it applies to
determination of "Lowest Responsible Bidder".

BACKGROUND INFORMATION: Council recently asked about the legality of
considering the 1% sales tax rebate which the
City receives from the State for goods bought and
sold in Lodi when making a determination of the actual "lowest responsible
bidder" for supplies purchased by the City. A draft ordinance addressing
this issue will be presented at the May 6, 1992 public hearing for Council
consideration.

FUNDING: None required.

Respectfully submitted,

Bob McNatt
City Attorney

BM/vc

APPROVED _____

THOMAS A. PETERSON
City Manager



CITY OF LODI

CARNEGIE FORUM
305 West Pine Street, Lodi

NOTICE OF PUBLIC HEARING

Date: May 6, 1992

Time: 7:30 p.m.

For information regarding the Public Hearing
Please Contact:

Alice M. Reimche
city Clerk

Telephone: 333-6702

NOTICE OF PUBLIC HEARING

May 6, 1992

NOTICE IS HEREBY GIVEN that on Wednesday, at the hour of 7:30 p.m., or as soon thereafter as the matter may be heard, the City Council will conduct a public hearing to consider the following matter:

- a) amending the Lodi Municipal Code Chapter 3.20 establishing criteria for determination of "Lowest Responsible Bidder".

All interested persons are invited to present their views and comments on this matter. Written statements may be filed with the City Clerk at any time prior to the hearing scheduled herein, and oral statements may be made at said hearing.

If you challenge the subject matter in court, you may be limited to raising only those issues you or someone else raised at the Public Hearing described in this notice or in written correspondence delivered to the City Clerk, 221 West Pine Street, at or prior to the Public Hearing.

By Order Of the Lodi City Council:

Alice M. Reimche
City Clerk

Dated: April 1, 1992

Approved as to form:

Bobby W. McNatt
city Attorney

CITY OF LODI
MEMORANDUM FROM THE OFFICE OF THE CITY ATTORNEY
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To: The Honorable Mayor and Council Members
From: Bob McNatt, City Attorney
Date: January 7, 1992
Subject: LOCAL BIDDERS PREFERENCE/SALES TAX REBATE
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ISSUE:

May the City of Lodi, in determining the "lowest responsible bidder", use as a factor the 1% sales tax rebate on the transaction which the City receives if the successful bidder's place of business is in Lodi?

CONCLUSION:

It may be permissible to take into account in determining the "lowest responsible bidder" the 1% rebate on sales tax received by the City for goods purchased from businesses in Lodi.

DISCUSSION:

Council Member Pennino recently asked about the legality of considering the 1% sales tax rebate which the City receives from the State for goods bought and sold in Lodi when making a determination of the actual "lowest responsible bidder" for supplies purchased by the City. My research suggests (but does not clearly show) that such policy may be legal.

Lodi Municipal Code Section 3.20.100(E) provides that contracts for supplies or services shall be let "... to the lowest responsible bidder ...". The Council has *some* discretion in determining who is, in fact, the lowest "responsible" bidder, and it may include such factors as the sales tax rebate.

However, as discussed below, this is a different matter than simply adopting a rule giving bidders a "preference" or bonus points if the bidder's place of business is within the City. Attached is my memo to the Council dated February 1, 1989 on the latter issue. My research still fails to turn up a single California appellate case on point. The best authority we have so far is an opinion of the California Attorney General (Volume 64, page 670) issued in 1981 which concluded that a pure "local preference" ordinance would probably be illegal and against California public policy.

The Honorable Mayor and Council Members
January 7, 1992
Page Two

This is different than the result in a recent Alaska case. In Big Country Foods, Inc. v. Anchorage Board of Education (January 1992. 192 D.A.R.), the Federal Ninth Circuit Court addressed the validity of an Alaskan State law giving a 7% bidding preference to suppliers of items if the business was headquartered in Alaska. The Court of Appeal upheld the law as it applied to purchase of milk for federally funded school lunch programs on the basis that it violated no federal provision. I suspect that California public policy would produce a different result here.

Also attached is a memo dated March 16, 1977 from the Sacramento City Attorney's office on the tax rebate issue. The memo suggests that including the sales tax factor in calculating the lowest bidder is appropriate since it does not truly give a "preference" to in-town bidders. It merely allows the city to calculate actual out-of-pocket costs for goods. I agree with both the reasoning and the conclusion in that 1977 memo.

To my way of thinking. this is different than a "preference" to local businesses (like the Alaska statute) because the City could actually end up paying more under a preference if it went with a second low bidder who resided in the City. Using the sales tax factor, the City will always pay less, because after figuring into the purchase price the 1% sales tax rebate, if a local bidder is not low, the contract will go to someone else.

To illustrate the difference between a "preference" and using a sales tax rebate factor, the following is offered:

If, for example, a 5% preference is given to local bidders, the City could pay \$1,050 to a local business for an item which an out-of-town vendor offered for \$1,000. Under this scenario, the City obviously pays more for the goods received.

Conversely, using the 1% rebate factor, a local bidder's price would have to be less than 1% over the next low bidder in order to be successful. If both bidders' price was \$1,000, the local business would get the contract since after the rebate, the City would actually have paid only \$990 out-of-pocket.

This is consistent with the public policy described in City of Inglewood, et al. v. Superior Court (1972) 7 Cal. 3d 861 and referred to in the California Attorney General's Opinion, which says it is in the public interest to have contracts awarded " ... without favoritism and at the lowest price consistent with reasonable quality."

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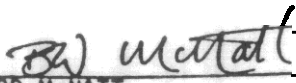
The Honorable Mayor and Council Members
January 7, 1992
Page Three

SUMMARY:

I believe a "preference" based solely on the business location of a bidder and assigning some arbitrary number or factor would still be impermissible. However, the sales tax rebate is not an arbitrary factor or number implemented by a city to favor local businesses, but rather a State law on municipal revenues which can be used to determine the actual out-of-pocket expense to the city and to establish who is truly the "lowest responsible bidder".

As such, it appears to me to be proper to consider this in calculating what the actual cost would be for purchase of supplies by the City.

Respectfully submitted,



BOB McNATT
City Attorney

BM:vc

attachments

cc: City Manager
Purchasing Officer

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